HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

A.O. No. 278 of 2005

United India Insurance Co. Appellant

Versus

Afsar Khan & others Respondents

Approved for reporting.

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Not approved for reporting

Date of decision 19.10.2006

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Appeal from Order No. 278 of 2005

United India Insurance Company Ltd;
through its Divisional Manager, Division Office,
Haldwani
District Nainital ..... Appellant

versus

1. Afsar Khan s/o Sri Ali Yaar Khan
2. Smt. Choti w/o Afsar Khan Both residents of Ujala Nagar, Haldwani, District Nainital
3. Ibney Hassan s/o Sri Hassan Khan, Village Padaradpur, T.P. Nagar, Bareilly

..... Respondents

Sri D.S. Patni, Advocate for the Appellant
Sri Z.U. Siddique, Advocate for respondents.

Dated: October 19, 2006

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Rajesh Tandon, J.

Hon. Rajesh Tandon, J.

1) This is insurer's appeal against the Award dated 1.4.2005, passed by the Motor Accident Claims Tribunal, Nainital.

2) The claimants, who are the unfortunate parents of deceased preferred a claim petition under section 166 of the Motor Vehicles Act, for the grant of compensation on account of the death of Mohd. Arif in a motor vehicle accident. According to the claimants on the fateful day on 10.7.2004 the deceased

was going to Lalkunwa from Haldwani by a Tempo No. UA 04-1394. At about 3.45 PM a truck No. DL-1-G.A./2281, which was being driven rashly and negligently dashed the Tempo due to which the deceased sustained fatal injuries and succumbed to his injuries at the spot. According to the claimants the deceased was 18 years old and was doing work of Carpenter. He was earning Rs. 5,000/- per month. The claimants claimed a sum of Rs. 8,35,000/- towards compensation.

3) Opposite party No. 1 appellant has denied the factum of the accident and has submitted interalila that the compensation claimed is excessive; that the claim petition is bad for non-joinder of necessary parties, as the owner and insurer of the Tempo have not been made party to the claim petition; that the accident took place due to negligent driving and overloading of the Tempo and as such the insurer of the truck is not liable to pay any compensation.

4) Respondent no. 3 Ibney Hasan has filed his written statement and has submitted that the accident occurred due to bursting of the tyre of truck. The driver of the truck had a valid driving licence.

5) In order to prove their case, the claimants examined P.W.1 Afsar Hussain and P.W. Mohd. Umar. The opposite parties have not examined any witness in defence.

6) On the basis of the evidence adduced by the claimants, the Claims Tribunal has held that the accident had taken place due to rash and negligent driving of Truck No. DL-1-GA/2281 by its driver.

7) So far as the compensation is concerned the Tribunal has recorded the finding that at the time of accident the age of the deceased was 17 years. He was hale and hearty and he could

have easily earned Rs. 100/- per day even by doing labour work. The Tribunal has assessed his annual income to Rs. 36,000/- and after deducting 1/3 amount for the self expenses of the deceased the annual dependency of the claimants on the income of the deceased was assessed to Rs. 24,000/-. The Claims Tribunal has selected multiplier of 15 considering the age of the parents of the deceased and thus by multiplying Rs.24,000/- with 15, the net compensation was worked out to Rs. 3,60,000/- . Rs. 2,000/- was also awarded for the last rites of the deceased and as such the total compensation of Rs.3,62,000/- was awarded by the Claims Tribunal. The Claims Tribunal also awarded pendente lite and future interest @ 9 % per annum, if the amount of award is not deposited within 40 days.

8) So far as the rash and negligent driving is concerned, none of the parties have adduced any evidence. In the case of accident the burden to prove the cause and manner of accident lies on the driver and owner of the vehicle involved in the accident. The owner of the truck respondent no. 3 has submitted in his written statement that the accident was caused due to bursting of the tyre of the truck but he has not adduced any evidence in support of his assertion. In the present case although the driver of the truck is still alive but he did not come in the witness box to state on oath the actual cause and manner of the accident. Copy of the F.I.R. is proper no. 7-C, in which description of the accident has been made. The same is brought on record of the Claims Tribunal by the claimants. The F.I.R. has been lodged by one Sri Harish. This person has categorically mentioned in the first information report that on 10.7.2004 he was waiting for conveyance at Depot No. 5. At about 3.45 PM a Vikaram No. UA 04/1394 was coming towards Depot No. 5

from Haldwani. At the same time Truck No. DL 1 GA/2281 which was being driven rashly and negligently came from the opposite direction and dashed the Vikaram (Tempo). Due to the severe impact the tempo rolled behind and stopped by the side of a tree.

9) The Apex Court in the case Syad Akbar Vs. State of Karnataka, AIR 1979 SC 1848 has held as under:

" It is to such cases that the maxim res ipsa liquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But , according to some decisions, satisfaction of this condition alone is not sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for the second requirement is that where the defendant has control of the thing, which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. * *

* * * *

Thus for the application of the maxim res ipsa loquitur no less important a requirement is that the res must not only bespeak negligence, but pin it on the defendant."

10) Thus in the absence of any oral evidence regarding the accident, the Claims Tribunal has rightly relied upon the assertion made out in the first information report that the accident took place due to rash and negligent driving by the truck driver.

11) The counsel for the appellant also raised plea of contributory negligence of the truck driver and Tempo Driver but said plea is not sustainable as the same has been raised for the first time in appeal and there is no such plea in the written statement filed by the Insurance Company.

12) Sri D.S. Patni, counsel for the appellant has further submitted that the Claims Tribunal has erred in selecting the multiplier of 15 while the claimants are the parents of the deceased and it should not be more than 10.

13) We have considered the submissions in the light of the evidence on record. The deceased was working as carpenter and was getting wages of Rs. 4,200/- per month as stated by P.W.2 Umar Khan. The claims tribunal has assessed his daily wages as Rs.100/- and thus assessed his annual income at Rs.36,000/-. A deduction of Rs.12,000/- has been made for the own expenses of the deceased. Thus the annual dependency of Rs.24,000/- has been assessed by the Claims Tribunal.

14) So far as the selection of multiplier in cases in which the claimants are parents of the deceased is concerned, the Apex court in the case of **Municipal Corporation of Greater Bombay vs. Laxman Iyer and another, (2003) 8 SCC 731,** has held that, where the claimants are parents of the deceased, the multiplier should not be more than ten.

15) We deem it necessary to reproduce paragraph 12 of the Apex Court judgment in that case:

"12. *Keeping in view the observations made by this Court in various cases, several other factors need to be taken note of. The deceased was unmarried. The contribution to the parents who had their separate earnings being employed and educated has relevance. The possibility of reduction in contribution once*

a person gets married is a reality. The compensation is relatable to the loss of contribution or the pecuniary benefits. The multiplier adopted by the Tribunal and confirmed by the High Court is certainly on the higher side. Considering the age of the claimants, it can never exceed 10 even by the most liberal standards. Worked out on that basis the amount comes to Rs. 3.6 Lakhs at the monthly expected income fixed by the Tribunal and confirmed by the High Court. Looking into the nature of the contributory negligence of the deceased after making an appropriate deduction which can reasonably be fixed at 25%, the compensation amount payable by the Corporation can be fixed at rupees three lakhs including the amount awarded by the Tribunal and confirmed by the High Court for loss of expectation of life. Interest at the rate as awarded by the High Court is maintained from the date of application for compensation."

16) In the present case the age of the mother is 30 years, she is a house wife. The father of the deceased is 42 years of age.P.W.1 Afsar Hassain in his statement has submitted that the family was dependant on the earnings of his deceased son but after his death there is none to earn and support the family for their livelihood. He has stated as under:

esjs yMds dh e`R;q ds ckn ls esjs ?kj dk [kpkZ pyuk eqf'dy gks x;k gS d;ksfd esjk yMdk tks dekdj ykrk Fkk mlh ls ?kj dk [kpkZ pyrk Fkk eSa etnwjh lfj;k ds tky ckW/krk gwW yMds dh e`R;q ds ckn ls esjk ekufld laUrqyu Bhd ugh jgk gS ftl dkj.k eSa dke ugha dj ik jgk gWwA esjk ;s lcls cMk yMdk FkkA blls nks NksVs yMds gSa tks i<rs gSA

17) From the above statement it is clear that the deceased was unmarried and was the sole breadwinner of the family. The claimants were fully dependent upon the income of the deceased. Thus the Claims Tribunal was fully justified in selecting higher multiplier that 10.

18) In the case of Municipal Corporation of Greater Bombay vs. Laxman Iyer & another (supra), the father of the deceased was a earning person in the family but in the present case the mother and father of the deceased are not earning persons. The Claims Tribunal has estimated the income of the deceased at Rs.3,000/- per month or Rs.36,000/- per annum and we also take the same view. Thus the annual dependency of the claimants on the income of the deceased works out to Rs.24,000/- after deducting Rs.12,000/- as the own expenses of the deceased from net annual income of Rs.36,000/-. The compensation to be awarded to the claimants at least, should be such amount, which if deposited in a Fixed deposit with a nationalized Bank can fetch Rs.24,000/- per annum.

19) In a motor accident claim case, what is important is that the compensation to be awarded by the Tribunal should be just and proper compensation after taking into account all facts and circumstances of the case.

20) The Apex Court, in the case of **T.N. State Transport Corpn. Ltd. vs. S. Rajapriya and others, (2005) 6 Supreme Court Cases 236,** has observed as under:

"8. *The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables e.g. the*

life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together.

9. *The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalised by multiplying it by a figure representing the proper number of years' purchase.*

10. *Much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case "it is the overall picture that matters", and the court must try to assess as best as it can the loss suffered."*

21) Thus we find that a multiplier of 15 would be just and proper in the present case. By multiplying the amount of annual dependency of Rs.24,000/- with 15 the amount of compensation comes to Rs.3,60,000/-. Apart from that the

claimants are also entitled to get Rs.2,000/- for the lat rites of

the deceased Thus the claimants are entitled to get Rs.3,60,000 + 2,000= Rs.3,62,,000/- as compensation.

22) The claimants have also filed cross objections and prayed for grant of Rs.8,65,000/- as compensation along with 9% interest. The claims Tribunal has awarded 9% interest in case the awarded amount is not paid within 40 days. The award is modified to the extent that appellant shall pay pendente lite and future interest @ 7% per annum on the amount of award. The cross objection is disposed of accordingly.

23) In view of above, the appeal is devoid of merit and is hereby dismissed. The compensation of Rs.3,62,000/- awarded by the Tribunal is confirmed. The amount deposited in this Court be remitted to the Claims Tribunal concerned forthwith.

24) No order as to costs.

(Rajesh Tandon, J.) **(Rajeev Gupta, C.J.)**

Dated: October 19, 2006
*Dhyani